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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION

FAWN CAIN, TANYA ARCHER, and SANDI OVITT, Relators and Plaintiffs, -vs- SALISH KOOTENAI COLLEGE, INC., SALISH KOOTENAI COLLEGE FOUNDATION, ROBERT FOUTY, individually, JIM DURGLO, individually, RENE PEIRRE, individually, ELLEN SWANEY, individually, LINDEN PLANT, individually, TOME ACEVEDO, individually, ZANE KELLY, individually, ERNEST MORAN, individually, LUANA ROSS, individually, CARMEN TAYLOR, individually, ELAINE FRANK, individually, LISA LACKNER HARMON, individually, REBEKKAH HULEN, individually, DAWN BENSON, individually, and DOES 1-10, Defendants.	CV 12-181-M-BMM **REPLY BRIEF IN SUPPORT OF INDIVIDUAL DEFENDANTS' MOTION TO DISMISS**

The Individual Defendants file this reply brief in support of their motion to

dismiss this matter.

I. Like the Amended Complaint, Plaintiffs' response brief makes conclusory legal allegations that are not entitled to a presumption of truth and lumps multiple defendants together without identifying the role of any individual in the alleged scheme.

Plaintiffs' response to the motion to dismiss merely underscores the deficiencies in their Amended Complaint. They continue to lump Salish Kootenai College, which has been dismissed from this action, and Robert Fouty, Jim Durglo, Renee Pierre, Ellen Swaney, Linden Plant, Tom Acevedo, Zane Kelly, Ernest Moran, Luana Ross, Carmen Taylor, Elaine Frank, Lisa Harmon, Rebekkah Hulen, and Dawn Benson ("Individual Defendants") together without distinguishing between them even once. They also rely on several cases that predate the more stringent pleading standards articulated in *Twombly* and *Iqbal* and ignore the Ninth Circuit's repeated admonition that "Rule 9(b) does not allow a complaint to merely lump multiple defendants together but requires plaintiffs to differentiate their allegations when suing more than one defendant and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." *U.S. v. Corinthian Colleges*, 655 F.3d 984, 997–98 (quoting *Swartz v. KPMG LLP,* 476 F.3d 756, 764–65 (9th Cir.2007)) (internal citations, quotations marks, and alterations omitted).

Citing *Erickson v. Pardus*, Plaintiffs even ask the Court to believe that "[t]he pleading of specific facts in support of a complaint is not necessary." But unlike

here, the Court in *Erickson* was tasked with liberally construing a *pro se* complaint, which "must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Moreover, the complaint did not involve allegations of fraud, which must be pled with particularity as to each defendant. Indeed, the Supreme Court noted in *Twombly*, just two weeks before *Erickson* was decided, that "[o]n certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than Rule 8 requires." *Bell A. Corp. v. Twombly*, 550 U.S. 544, 597 n. 14 (2007). And in *Iqbal*, the Court emphasized that a plaintiff must include "well-pleaded, nonconclusory factual allegation[s]" to support any legal conclusions alleged in the complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009). *See also Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001) (broad allegations must be accompanied by "particularized supporting detail"). There must be enough facts alleged to raise a right to relief above the speculative level to a plausible level, which requires more than a showing of "a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 679–80.

Here, there is no particularized, supporting detail linking Fouty, Durglo, Pierre, Swaney, Plant, Acevedo, Kelly, Moran, Ross, Taylor, Frank, Harmon, Hulen, or Benson to the alleged fraud or retaliation. Accordingly, the allegations "are insufficient to show the allegations against these defendants have a 'factual

basis.'" *U.S. ex rel. Swoben v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1181–82 (9th Cir. 2016) (quoting *Bly–Magee*, 236 F.3d at 1018–19). Though the allegations "describe some details of a generalized scheme, [] they provide no details linking these defendants to the scheme." *Id.* Such allegations are insufficient under Rule 9(b). *Id.*

Plaintiffs insist in their response that "[i]t is clear that the individual Defendants were the ones that oversaw and participated in" the alleged fraud. But alleging as to each individual that he or she held a position at the College and supervised some College employees does not plausibly establish sufficient personal involvement in, or personal liability for, the alleged FCA violations. *United States v. Bornstein*, 423 U.S. 303, 312–13 (1976); *United States ex rel. Burlbaw v. Regents of N.M. St. U.*, 324 F. Supp. 2d 1209, 1216 (D.N.M. 2004). Cursory allegations of authority over a corporation that allegedly engaged in fraud do not support an inference of involvement. *F.T.C. v. Swish Mktg.*, 2010 WL 653486, at *4–5 (N.D. Cal. Feb. 22, 2010); *U.S. ex rel. Decesare v. Americare in Home Nursing*, 1:05CV696, 2011 WL 607390, at *8 (E.D. Va. Feb. 10, 2011).

"In the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum identify the role of each defendant in the alleged fraudulent scheme." *Corinthian Colleges*, 655 F.3d 984, 997–98 (9th Cir. 2011). Merely stating that "everyone did everything" does not meet the Rule 9(b) standard.

Destfino v. Reiswig, 630 F.3d 952, 958 (9th Cir. 2011).

In their response brief, Plaintiffs double-down on their implausible allegations that "everyone did everything." They allege that "the individual Defendants all acted in similar manners, had similar involvement in the fraudulent behavior, had similar interactions with the Plaintiffs and similar knowledge" and that the collective pleading style is therefore allowable. But it is simply not plausible that the 13 individuals, who served in various roles at the College, each had the exact same role in the alleged fraud or are each responsible for each of the collective allegations. To hold individuals personally liable under the FCA, plaintiffs must plead sufficient facts to tie each individual to the alleged scheme and to demonstrate knowing, personal involvement in the alleged scheme.

The deficiencies of the Amended Complaint at issue are nearly identical to those the Ninth Circuit identified in the complaint in *Corinthian Colleges*, a case that Plaintiffs fail to address in any way. The complaint in *Corinthian Colleges* also alleged that "[the College] and its co-defendants are liable to the United States under the FCA," but it lacked "supporting factual allegation[s]" as to the "nature of the Individual Defendants' involvement in the fraudulent acts . . . simply attribute[ing] wholesale all of the allegations against [the College] to the Individual Defendants." *Corinthian Colleges*, 655 F.3d at 998. As in that case, the Amended Complaint here should be dismissed for failure to particularly allege any

meaningful participation in the alleged wrongful conduct by any of the individual defendants. The Court cannot draw a reasonable inference from the facts alleged that any one of the thirteen Individual Defendants participated in the alleged fraud.

II. The Amended Complaint does not satisfy the False Claims Act's "rigorous materiality requirement."

Despite the Plaintiffs' conclusory statements to the contrary, the Amended Complaint does not satisfy the False Claims Act's "demanding" and "rigorous" materiality standard. *Universal Health Servs., Inc. v. U.S.*, 136 S. Ct. 1989, 2003 (2016). It is not "sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance." *Id.* The Amended Complaint contains no well-pleaded, factual allegations supporting the conclusory legal allegation that the allegedly fraudulent representations were material to the government's payment decision. *Id.*; *D'Agostino v. ev3, Inc.*, 845 F.3d 1, 7 (1st Cir. 2016); *United States v. Gatan, Inc.*, 2017 WL 5754787, at *4 (E.D. Cal. Nov. 28, 2017). It is not "shameful" to ask that Plaintiffs satisfy the pleading standard.

III. Individual board members and administrators are not liable under the FCA's retaliation provision.

The vast majority of courts, including the Fifth Circuit and every district court in the Ninth Circuit that has considered the issue, have concluded that the statutory amendment highlighted by Plaintiffs did not expand the class of potential

defendants subject to liability under a FCA retaliation claim to include individuals who were not the plaintiffs' "employer." *Howell v. Town of Ball*, 827 F.3d 515, 529 (5th Cir. 2016), *cert. denied sub nom. Town of Ball, La. v. Howell*, 137 S. Ct. 815 (2017); *Brach v. Conflict Kinetics Corp.*, 221 F. Supp. 3d 743, 748–49 n. 9 (E.D. Va. 2016) (citing 25 cases). Indeed, the only Ninth Circuit court cited by Plaintiffs agreed with the general "consensus" that the 2009 amendment did not expand liability to individuals such as coworkers, supervisors, or corporate officers. *United States v. N. Am. Health Care, Inc.*, 2015 WL 6871781, at *8 (N.D. Cal. Nov. 9, 2015). Every other Ninth Circuit district court that has considered the issue has likewise concurred with the general consensus. *See United States ex rel. Lupo v. Quality Assurance Services, Inc.*, 242 F. Supp. 3d 1020, 1029 (S.D. Cal. 2017); *United States v. Kiewit P. Co.*, 41 F. Supp. 3d 796, 813–14 (N.D. Cal. 2014); *United States of Am. ex rel. Winter v. Gardens Regl. Hosp. & Med. Ctr., Inc.*, 2017 WL 8793222, at *8 (C.D. Cal. Dec. 29, 2017); *United States v. Monaco Enterprises, Inc*, 2016 WL 3647872, at *10 (E.D. Wash. July 1, 2016); *Wichansky v. Zowine*, 2014 WL 289924, at *3–5 (D. Ariz. Jan. 24, 2014).

Those courts that have analyzed the legislative history of the amendment have all found that Congress did not intend to create individual liability under § 3730(h). As the Fifth Circuit stated, "it is clear that the reference to an 'employer' [in § 3730(h)] was deleted to account for the broadening of the class of

FCA plaintiffs to include 'contractors' and 'agents,' not to provide liability for individual, non-employer defendants." *Howell*, 827 F.3d at 530. *See also Kiewit P. Co.*, 41 F. Supp. 3d at 813; *Lupo*, 242 F. Supp. 3d at 1029. The fact Congress retained reinstatement as a mandatory element of damages for a violation of § 3730(h), further demonstrates that Congress did not intend to amend the statute to reach individual coworkers, supervisors, or board members, as only the employer/principal can provide such relief. Plaintiffs offer no convincing reason to depart from the "overwhelming majority of" decisions on this issue. *Brach*, 221 F. Supp. 3d at 748. Accordingly, the retaliation claim should be dismissed against each defendant.

Conclusion

The Supreme Court has made clear that complaints brought under the False Claims Act must meet exacting standards. *Universal Health Servs.*, 136 S. Ct. at 2002, 2003. "[S]trict enforcement" of each element of the FCA is required to prevent it from becoming a statute of "open ended liability." *Id.* at 2002. The FCA is not intended to reach garden-variety claims or impose treble damages and other penalties on every supervisory employee or board member of a corporation alleged to have violated the Act. A plaintiff must establish by well-pleaded factual allegations that an alleged misrepresentation was material to the government's payment decision. Further, to state a claim against a corporate employee or board

member in his or her individual capacity, a plaintiff must establish by particular, factual allegations that the defendant was knowingly and personally involved in the alleged violation. Plaintiffs have not done so here, as to any individual defendant. Accordingly, the Amended Complaint should be dismissed.

Plaintiffs bizarrely claim that this is the first time the sufficiency of their allegations against the Individual Defendants has been attacked. But the initial complaint against the Individual Defendants was dismissed with leave to amend for the same reasons underlying the instant motion. The Court faulted Plaintiffs for "fail[ing] to differentiate the alleged conduct of the Board Members from the alleged conduct of any other Defendants" and "alleg[ing] repeatedly that 'Defendants' engaged in wrongful conduct." (Doc. 39 at 17.) It gave Plaintiffs specific instructions to "add any facts to the complaint that rendered plausible the notion that individual defendants oversaw or actively participated in alleged fraudulent conduct" or that "individual Board Members undertook specific acts that give rise to a claim." (Doc. 39 at 29.)

Despite these clear instructions, Plaintiffs instead added more individuals to the Amended Complaint, but continued to lump all the defendants together without differentiation. They added no facts to support their conclusory allegations of individual liability and failed to link any individual defendant to any specific act. Having already been granted leave to amend and having ignored the clear

instructions of the Court in making that amendment, Plaintiffs should not be granted leave to amend again. Moreover, at any time in the past three years and seven months, Plaintiffs could have but did not move for leave to amend again to satisfy the pleading standards. This delay is unjustified and further supports denying Plaintiffs' request for leave to amend.

DATED this 2nd day of August 2018.

WORDEN THANE P.C.

/s/ Martin S. King
Martin S. King

CERTIFICATE OF COMPLIANCE

In accordance with U.S. District Court Local Rule 7.1(d)(2), the undersigned certifies that the word count of the above brief, as counted by the undersigned's word processing software and excluding the caption and certificate of compliance, is 2,023.

WORDEN THANE P.C.

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